



STATE OF WASHINGTON
DEPARTMENT OF AGRICULTURE

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March 30, 2004

Assistant Director for Endangered Species
U.S. Fish and Wildlife Service
4401 North Fairfax Drive
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To Whom It May Concern:

The Washington State Department of Agriculture (WSDA) appreciates the opportunity to comment on the proposed Counterpart Regulations to the ESA outlined in the Federal Register Notice (FRN), published Friday, January 30, 2004 (Volume 69, No. 20).

Presently, greater than 70% of the landmass of the State of Washington is covered by Endangered Species Act (ESA) listings—predominantly for salmonids. Therefore, the WSDA is very well aware of the potential impacts on pesticide use that implementation of the ESA can have and it is mindful of the current roadblocks to pesticide/ESA consultations. WSDA applauds the Federal agencies for addressing this roadblock, and for their collaboration in developing the proposed counterpart regulations. WSDA supports the proposed counterpart regulations and will detail below with specific comments how WSDA believes the counterpart regulations will assist (1) EPA in obtaining ESA compliance, (2) agriculture by allowing the agencies with regulatory authority to make decisions rather than the courts, and (3) the fisheries resources.

Finally, WSDA's perspective on the FIFRA/ESA issue is very much driven by frustration with the current situation in which the courts are implementing measures based on legal arguments rather than science. WSDA is very supportive of moving the decision-making back to where it belongs; between EPA and the Services.

Specific Comments

§402.40 Definitions

(b) Effects Determination

The new definition for an effects determination allows EPA to include elements of a biological opinion in its initiation package to the Services. These elements include: a conclusion of jeopardy, the impact of any incidental taking from the FIFRA action, reasonable and prudent measures to minimize such impact, terms and conditions to implement such measures, and a summary of information from the applicant (assumed to be the pesticide registrant).

This is a significant change to an effects determination (initiation package) and indicates a departure from other Section 7 consultation processes. The proposed change to the definition would decrease the review time for the package by the Services and would rely instead on EPA to perform such action. WSDA supports the revised definition because it speeds up the consultation process. Hopefully, this will allow the Services and EPA to meet their Section 7 consultation requirements in a timely manner.

In addition, allowing EPA to provide reasonable and prudent measures to minimize impact of the FIFRA action (i.e., mitigation measures) is a positive step. EPA, in coordination with the State Lead Agencies, typically has a more fundamental understanding of the use of the pesticide, and therefore a greater ability to design mitigation measures that can minimize harm to the species, while not implementing measures that are inconsistent with the needed use of the pesticide.

§402.42 Scope and applicability

(a)(6) Emergency Exemptions under Section 18 of FIFRA

The acknowledgement in this subpart defines that consultations on actions related to FIFRA Section 18 Emergency Exemptions can be conducted in accordance with §402.05 Emergencies under the ESA. This section provides considerable relief for the states and pesticide users as they request Emergency Exemptions from EPA for particular pesticide uses. This allows the use to go forward without prior consultation, which is consistent with the emergent need for the use. WSDA supports this definition and appreciates the clarity to which it is identified in this subpart.

§402.43 Interagency exchanges of information

This section increases the overall interagency cooperation related to ESA/FIFRA interactions. WSDA applauds and supports this cooperation. This section ensures that EPA will have available to it, the complete list of listed species or critical habitat present in an area that EPA is evaluating for a FIFRA action. In addition, EPA can also request the environmental baseline for an action area. This is a significant change. EPA typically has not had available to it the other actions that may occur in an action area that could significantly impact the species for which they are evaluating effects. WSDA supports this type of interagency cooperation, because again, with information provided at the onset of a determination, EPA will be able to develop an effects determination that is consistent with what the Services would be required to do, thereby reducing review time and speeding up the process.

§402.44 Advance coordination for FIFRA actions

Similar to other sections of this proposed rule, this section increases the overall cooperation and exchange of information/expertise between EPA and the Services. Personnel from the Services can be requested by EPA to participate fully in EPA's effects determination development. This allows EPA and the Services to identify any specific issues related to a particular pesticide determination prior to its completion as well as a greater opportunity to understand how each agency approaches and performs its regulatory responsibilities. WSDA supports this type of cooperation.

§402.45 Alternative consultation on FIFRA actions that are not likely to adversely affect listed species of critical habitat

This section removes the need for EPA to informally consult with the Services on actions that EPA determines are 'not likely to adversely affect' (NLAA) a listed species or its critical habitat if an Alternative Consultation Agreement (ACA) is in effect. The ACA is cited in the FRN and was available on the EPA and Services' websites. The ACA provides a mechanism to ensure that if EPA makes NLAA determinations that the species in question is afforded the same protections as under current regulations. The agreement sets forth checks and balances to ensure appropriate training, exchange of information, incorporation of scientific advances, as well as oversight and record keeping issues. Further, the ACA was developed so that it could be revised over time, something that WSDA supports to ensure some flexibility for incorporating future actions. WSDA supports the proposal to use the ACA to allow EPA to make NLAA determinations without any form of consultation. WSDA believes that this will streamline the consultation process thus allowing EPA and the Services to meet their respective regulatory obligations.

§402.46 Optional formal consultation procedure for FIFRA actions

This section establishes strict timelines for formal consultation and allows the Services one of three options in responding to a request for formal consultation. The Services can accept the effects determination (if it is developed in accordance with §402.40(b)), modify the effects determination, or draft a biological opinion of their own. In addition, EPA and the Services must submit, acknowledge and request information within specified periods of time after the initiation of consultation. While WSDA supports developing strict timelines to ensure actions on pesticides are not delayed, WSDA is concerned with the ability of the agencies to meet these strict timelines based on previous experience. However, given the reduction in overall workload provided by actions identified in §402.45, it is conceivable that the agencies can meet these goals. WSDA encourages the federal agencies to develop realistic goals to ensure that their future ability to perform such actions remains with them and not the courts.

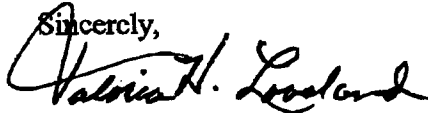
Additionally, a new section allowing EPA to share information with the applicant (assumed to be the pesticide registrant) will allow the registrant to participate in the consultation process. This should benefit the process as typically the registrant has significant information available relative to the use of the pesticide and potentially additional toxicity studies. However, it is critical that State Lead Agencies also have a role in this process. It is important that affected states are involved in any discussion regarding possible mitigation measures that are imposed through labeling. Too often, uses are dropped from a label, or unrealistic restrictions imposed, without any input from the affected commodities or the State Lead Agency. State Lead Agencies, like WSDA with its own Endangered Species Program, can play a vital role in the process.

§402.47 Special consultation procedures for complex FIFRA actions

This section addresses one of the most difficult questions facing EPA in achieving ESA compliance and for implementing EPA's Endangered Species Protection Program, which is how

does one prioritize the species and/or geographic region for consultation on a particular pesticide. The proposed mechanism, which allows EPA and the Services to develop biological assessments and opinions in successive steps, will greatly facilitate overall ESA compliance since each individual determination and opinion can be combined over time to finish the consultation for a specific pesticide. WSDA supports this section and the recognition that while some consultations may be easier to conduct using the other sections of this proposed rule, others may be complex.

Sincerely,

A handwritten signature in black ink, appearing to read "Valoria H. Loveland". The signature is fluid and cursive, with the first name being the most prominent.

Valoria H. Loveland
Director